No. 72-637

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

KENNECOTT COPPER CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

KENNECOTT'S REPLY TO THE BRIEF IN OPPOSITION

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I

Since the filing of the petition, the Court has noted probable jurisdiction in *United States* v. *General Dynamics Corp.* (No. 72-402) where the lower court, emphasizing the competitive impact of other fuel sources upon producers of coal, held that the relevant market for determining the competitive effects of a merger between two coal producers was energy as a whole rather than coal alone. The Government acknowledges that the decision below, which held coal alone to be the market, conflicts with *General Dynamics* (Br. 8), just as it argued in its brief in opposition to the motion to affirm in *General Dynamics* (pp. 2-3) that the two

decisions were inconsistent not only on the delineation of the market but also on the effect of interfuel competition. The Government nevertheless contends (Br. 8-9) that the Court should not grant certiorari because in its view the Court of Appeals "properly applied the correct standards" in resolving the market issue in this case, quoting (Br. 7) a single conclusory passage from the Court of Appeals' opinion which is unsupported by any evidentiary analysis either in that opinion or in the opinion and findings of the Commission.[1]

The showing made by the Government provides no basis for the Court to accept the Government's invitation to determine summarily that the Court of Appeals' decision in this case either as to product market or competitive significance of interfuel competition was correct and the decision of the District Court in *General Dynamics* incorrect. Indeed, the dramatic impact of competition among the fuels—including the growing use of commercial nuclear energy—upon the requirements for competitive success in the sale of coal (Pet. 6-7, 16-17) is of even greater significance in this case than in *General Dynamics*. Kennecott's acquisition of Peabody was not a combination of two existing coal producers, but the effort of a copper producer to diversify into the energy industry. The absence of any direct elimination or foreclosure of competition in any possible line of commerce and the affirmative nature of Kennecott's commitment of new resources to energy production at a time when it is universally recognized that the nation

[1] Contrary to the Government's further contention that the determination of the product market was an "essentially factual" one (Br. 7), only the proper application of legal standards is in question, as there is no evidentiary conflict with respect to interfuel competition.

has entered a period of energy crisis argue forcefully for the employment of a broad and economically realistic perspective, taking into account all competing fuels, in judging the competitive impact of the acquisition under Section 7.

Consideration of this case as well as *General Dynamics* should aid the Court in gaining a full appreciation of all the elements which bear on resolution of the issues of market definition and the competitive significance of interfuel competition common to both, as well as enable the Court to determine whether any distinction should be made between the two situations and, if so, in what respect. Consequently, the Court may wish to set this case for oral argument with *General Dynamics*.

II

With respect to the other, equally important questions presented by the petition (pp. 20-26) regarding the application of the potential competition doctrine to a merger of economically unrelated companies and to an unconcentrated industry, the Government does not even argue that these questions lack substantial importance in the administration of Section 7 or have been settled by prior decisions of this Court.

In fact, the Government acknowledges that all "the potential competition cases which this Court has considered have involved highly concentrated markets" (Br. 10, n. 5) and does not deny that the previous potential competition cases also have involved a merging company which was the only potential entrant or one of a very few into the market in

question. The Government does not contend that these two factors, which have been inherent in all previous determinations of a probable substantial lessening of competition through elimination of a potential competitor, are established by the record in this case. Instead the Government proposes lesser standards, arguing that although the coal industry is not concentrated, there is an " 'alarming trend' toward high concentration" (Br. 11) and that "Kennecott was the most likely entrant and *may have been* the only reasonably likely entrant" into the coal business (Br. 13-14; emphasis supplied).

The basic deficiencies in the Government's departure from the standards of the Court's prior potential competition decisions are discussed in the petition at pages 20-26. The claim now advanced by the Government that the alleged "trend toward concentration" which the Commission found had taken place in the past will continue because "large coal companies will continue to preempt most new business opportunities, and . . . smaller firms will in all likelihood be unable to arrest" it (Br. 12) ignores the basic fact that the factors which are going to shape the future of the coal industry are quite different from those which shaped its past.

Peabody and other leading coal producers have grown because they have been able to develop and finance extensive reserves and new production and transportation techniques that have enabled them to compete with other fuel sources for the growing demands of electric utilities, which account for 70% of steam coal consumption. As the size of electric generating plants increased, requiring the

delivery of ever-larger annual tonnages of coal under long-term contracts,[2] and as nuclear energy, along with oil and gas, became an increasingly effective competitor, the growth of the larger coal companies was essential to effective competition with other energy sources to supply the electric utilities and, therefore, to the survival of the coal industry itself. Their growth came not at the expense of the small producers—who were unable to compete with oil, gas and nuclear energy to serve the needs of the large utility consumers—but through successful competition with suppliers of the other fuels.

It is highly significant that the coal industry has a large number of strong competitors, not among the top 4 or top 8, which can and do compete effectively with the largest producers and with suppliers of other fuels. It is at least equally significant that a number of substantial, well financed new competitors are entering the coal business and are supplying and will supply in the future additional strong competition to the leading producers. The significance of the first factor is entirely ignored in the opinions of the Commission and the Court of Appeals and in the Government's brief; the other factor—new entry—is the subject of serious misrepresentation of the record.

Contrary to the Government's assertion (Br. 13), Dr. Fox did not testify—much less "concede"—that "Kennecott was more closely related to coal than the oil companies." Dr. Fox testified that with respect to "the pure mining aspect . . . a company like Kennecott would

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[2] Today, single plants of up to 4 million kilowatts capacity are being constructed: such a plant consumes about 10 million tons of coal a year, or about 300 million tons over a useful life of 30 years, which requires 60,000 acres of coal reserves (App. 2241, 2253).

have more capability than a company which had not been involved in any other kind of mining," but went on to say that the capabilities required to compete in the coal business "go well beyond simply the process of getting the product out of the ground" and oil companies have these "other capabilities" (App. 3015).[3]

Dr. Fox further testified that there was a "spectrum" of potential entrants into the coal business, including—in order of likelihood—oil companies, natural gas companies and certain utilities and railroads; Kennecott he placed at the lower end of the spectrum, below all the foregoing. Dr. Fox said that the oil companies were "very high" on the "spectrum" of potential entrants precisely because their existing businesses were so closely related to coal, which was but "another aspect of the energy business" in which they were already engaged. (App. 3000-07)

Similarly, Mr. Philip Sporn, "one of the nation's leading authorities on energy and the electric utility industry" (C27), testified from his years of experience in the energy industry and from his service as a consultant to oil companies:

> "If the oil industry is going to have a future, they have to break out of the fence they are fenced in by as members of the oil industry. They have somehow got to get into another aspect of the energy industry which they have done so well in, which they know a great deal about, but which has limited growth.
>
> "Certainly, the obvious market open to them is coal. It seems to me that this unquestionably is the

[3] Oil companies do not necessarily lack mining experience; Kerr-McGee, for example, is engaged in the uranium and potash businesses, as well as oil (App. 2887; see also App. 642-43, as to the participation of many oil companies in the uranium business).

> principal reason why the oil companies have gone into the coal business and why they couldn't do anything else if they are mindful of the future and their need to grow." (App. 2258)

It is in the face of this testimony, as well as the record evidence showing specific actual and potential entry by oil and other companies into the coal business (C80-83), that the Government has represented to the Court (Br. 13), "The record does not indicate that any other company had a comparable incentive [to Kennecott] to enter the coal business."

The Government further represents, "None of the mining consultants and coal company witnesses who testified, except Kennecott officials, regarded any of the oil companies as a potential entrant into the business of producing and selling coal" (Br. 13), but again the record is to the contrary. Neil Robinson, a leading coal mining consultant, testified that "the oil companies are considering that coal is now a growth industry" (App. 2150) and that he had been consulted by two oil companies which had made plans to enter into the coal business by opening mines on previously purchased reserves and had begun negotiations to sell the output to utilities under long-term contracts (App. 2175-80).[4] Similarly, both Clayton Ball and John P. Weir of Paul Weir Company, coal mining consultants, testified

[4] These were in addition to Standard of Jersey which, as the record shows, had entered the coal business shortly before the trial of this case by contracting, through its subsidiary Humble, to deliver coal to Commonwealth Edison, one of Peabody's two principal customers, starting in 1970 (Pet. 23-24).

that they had been consulted by oil companies about entry into the coal business and that there were "two basic reasons" for the interest of oil companies in coal: their desire to diversify "into something which makes profits," and their desire to acquire reserves for future production of synthetic fuels (App. 2119-20; see App. 2088-89).[5]

The Government's misstatements on the role of the oil companies in the coal business highlight a fatal flaw in the entire approach of the Commission and the Court of Appeals. The Government acknowledges, as it must, that new entry "can break the force of a trend toward concentration" (Br. 10). The actual movement into the commercial coal business of the oil companies and some gas companies, as well as electric utilities and railroads that have for years owned large coal reserves (C80-84, C226-27), deprives of all credibility the Commission's "trend" analysis and forecast and its emphasis upon "formidable entry barriers" (Br. 11-13). The new companies in the process of entering the coal business have all the capabilities required—including extensive coal reserves as well as "the necessary capital and a particular incentive"—to overcome the barriers to entry (Br. 13) and their entry belies the assertion that the "large coal companies will continue to preempt most new business opportunities" (Br. 12).

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[5] The Government's record misrepresentations are not limited to the question of new entry. The claim that complaint counsel "argued that Kennecott was a potential toehold entrant" (Br. 18, n.10) and therefore did not disavow the "toehold" theory is a distortion of the record. *After* raising the "toehold" theory in his *argument on appeal* (shortly after the Commission's decision in *Bendix*, since reversed), complaint counsel was asked by Commissioner Dixon whether that theory had been charged and replied, "We didn't make any charge that Kennecott was a potential [entrant] by acquisition, Commissioner Dixon. We said they are a potential entrant *de novo*, and we stand on that" (App. 3127).

Conclusion

For the reasons stated in the petition and herein, a writ of certiorari should issue.

Respectfully submitted,

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